

## Search & Seizure

### Reasonable Suspicion to Stop

#### **Commonwealth v. DePeiza**

Appeals Court, June 2, 2006

*An individual's manner of walking is, by itself, too idiosyncratic to serve as the basis for a reasonable suspicion of criminal activity.*

Two police officers, on patrol in an unmarked cruiser, observed the defendant walking down the street late at night in a high crime area. The defendant's right arm was rigid, not moving, and pressed against his side as if he was holding something. Based on their training and experience, the officers determined that the defendant might be using the "straight arm method" to conceal a firearm. The officers drove alongside the defendant, called out to him using a random name, and asked him if he lived in the area, where he was coming from, and where he was going. In response, the defendant avoided eye contact and attempted to shield his right side from their view. Concerned that the defendant was about to run, one of the officers stepped out of the car and approached him.

While the defendant was providing the police with proper identification, the officers noted that the defendant's jacket was tilted to the side as if it held a heavy object. Believing the defendant's jacket contained a firearm, the police announced they would frisk him. The defendant attempted to move back to avoid being frisked. One officer grabbed the defendant's jacket pocket and discovered a handgun. The defendant was convicted of illegal possession of a firearm and ammunition and appealed claiming the stop and pat frisk violated his constitutional right against unreasonable searches and seizure.

The Appeals Court agreed and held that the officers did not have sufficient reasonable suspicion of criminal activity or sufficient reasonable apprehension of danger to stop and pat frisk the defendant. Although the officers' initial interaction did not exceed constitutional boundaries, as soon as the officers indicated their intent to frisk the defendant, (and he was

therefore not free to leave) the officers crossed the constitutional line. In reaching its decision that the officers lacked reasonable suspicion that the defendant might be engaged in criminal activity the court cited the following factors:

- The officers had neither observed nor received any report of criminal activity, a firearm being brandished, or shots being fired.
- The officers had no prior knowledge of or dealing with the defendant.
- The officers' suspicion that the defendant possessed a gun did not establish reasonable suspicion that he also lacked a license to do so.

Likewise, the court found the officers lacked reasonable apprehension of danger because:

- There were no facts indicating the defendant was armed and dangerous.
- The defendant did not make any furtive movements to his jacket pocket or waistband.
- There was no showing of exigency or immediate danger.

Although the officers testified that ten to fifteen percent of their twenty-five gun arrests in the previous eight months involved an initial observation of the straight arm method, the court concluded the officers were merely pursuing a "hunch." In his concurring opinion, Justice Brown went so far as to suggest that the underlying rationale for stops of persons of color appears to be "motion" as in "driving while black" and "walking while black," "I can only hope that these practices will not degenerate into stops based upon 'breathing while black.'"

In his dissent, Justice Raposa acknowledged that "a number of the officers' observations could, considered individually, admit of an entirely innocent explanation." However, when combined, he found that the circumstances justified a reasonable suspicion on the part of the officers.